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INTER-SPORTS MARKETING SDN BHD v. NG CHIN CHAI & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
B MAH WENG KWAI JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-834-04-2013]
29 DECEMBER 2014

C ***CONTRACT:*** *Contractual terms – Obligations of parties under contract – Marketing agreement – Commercial rights – Whether appellant sub-licensed rights to third party – Whether respondent aware of terms in sponsorship agreement – Whether appellant relieved of its obligations under marketing agreement – Whether appellant liable under marketing agreement to settle outstanding sums due and owing to respondent – Whether respondent privy to agreement between appellant* D *and third party – Conduct of respondent – Whether respondent accepted performance from third party – Contracts Act 1950, s. 42*

CIVIL PROCEDURE: *Parties – Association – Sports body – Sports Development Act 1997 – Failure to settle outstanding sum due and payable – Suit against – Whether respondent a separate legal entity – Whether respondent under direct* E *management and control of its office bearers – Whether led by president – Whether president had knowledge of agreements entered into by parties which affected dealings with respondent*

The first respondent ('plaintiff'), suing through its public officer, sued the F appellant ('defendant') for the sum of USD305,000 being the balance due under a marketing agreement ('the marketing agreement') dated 15 December 2005. The facts revealed that in 2005, the plaintiff was selected to organise the world badminton championship which was to be held in 2007. The plaintiff entered into a marketing agreement where it was agreed that certain commercial rights such as marketing, promotional, advertising G and licensing rights would be granted to the defendant for a consideration of USD900,000. A sum of USD595,000 was paid to the plaintiff and a balance of USD305,000 was still outstanding. The defendant, however, sub-licensed its rights under the marketing agreement to one Sports Media Promotions Sdn Bhd ('SMP') on 3 October 2006 and subsequently, a H sponsorship agreement was entered into between Perusahaan Otomobil Nasional Sdn Bhd ('Proton') and First Events Promotions Sdn Bhd ('FEP'). In the circumstances, FEP claimed to have acquired the exclusive marketing, advertising and commercial rights of the championship from the defendant and was able to grant the rights as stated in the agreement to I Proton. Pursuant to the sub-licence and the sponsorship agreement, the

defendant claimed that it was relieved of its obligations under the marketing agreement. The plaintiff, however, argued that it was not a party to both the sub-licence and the sponsorship agreement and the defendant had the obligation to settle the consideration payable as agreed. In the High Court, the learned judge decided in favour of the plaintiff and held, *inter alia*, that (i) the plaintiff had no privity of contract with SMP and FEP; (ii) although the plaintiff was aware of the sub-licence and the sponsorship agreement, it did not change the fact that the plaintiff was not a party to those agreements; and (iiii) the defendant remained liable under the marketing agreement for the consideration payable although it may have parted with some of its rights under the marketing agreement. The court also dismissed the defendant's claim for indemnity against SMP, which was brought in as a third party in that action. Hence, this appeal. The issues that arose for consideration were (i) whether the plaintiff had accepted the performance of the defendant's obligations under the marketing agreement by a third party; and (ii) whether the defendant continued to be liable under the marketing agreement.

Held (allowing appeal with costs)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) Pursuant to an order which directed for further and better particulars to be furnished, the plaintiff acknowledged that it had received a sum of USD50,000 from the defendant. However, only USD40,000 was meant for the championship. The plaintiff subsequently received USD555,000 from FEP. Further, the marketing agreement revealed the possibility of a third party entering into the picture as sponsor and having all the commercial rights granted to the defendant. (paras 14, 15 & 18)

(2) The term commercial rights as defined in the marketing agreement meant all the rights in cl. 3 and that included broadcasting rights. The sponsorship agreement provided for the television broadcast to be arranged by FEP and it was to be paid the sum of USD1.2 million. From that amount, the sum of USD900,000, *ie*, the same sum payable to the plaintiff under the marketing agreement by the defendant, was to be paid to FEP by Proton. It was questionable, *inter alia*, as to how the president of the plaintiff ('PW1') could be ignorant of the sponsorship agreement when his signature appeared on the said agreement as a witness to the signature of FEP's executive chairman. (paras 21, 22, 24 & 27)

(3) The plaintiff was a sports body duly registered under the Sports Development Act 1997. Unlike a company, the plaintiff did not have a separate entity. Therefore, the plaintiff was under the direct management and control of its office bearers led by the president. It was inconceivable that (i) PW1 did not know about the rights

previously contracted out to the defendant had been taken over by FEP and thereafter contracted out most of those rights to Proton; and (ii) the plaintiff accepted a sum of USD555,000 from FEP and allowed Proton and FEP to run the commercial and marketing side of the championship without inquiring about the defendant. (paras 28 & 29)

(4) The plaintiff had agreed to the rights and obligations under the marketing agreement to be taken over by FEP. As such, s. 42 of the Contracts Act 1950 applied. The plaintiff, being the promisee under the marketing agreement, had accepted the performance of the promise from FEP. The plaintiff could not thereafter enforce that promise against the defendant. (paras 35-37)

Legislation referred to:
Contracts Act 1950, s. 42

For the appellant - Ravi G (Aida Hassan with him); M/s Ravi G
For the respondents - Mogan Mariappan; M/s Ho Mogan & Nor'aini

[Editor's note: For the High Court judgment, please see Ng Chin Chai v. Inter-Sports Marketing Sdn Bhd [2011] 10 CLJ 580.]

Reported by Kumitha Abd Majid

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This is an appeal by Inter-Sports Marketing Sdn Bhd ("defendant") against the decision of the learned High Court Judge handed down on 11 March 2013 allowing the claim by Persatuan Badminton Malaysia or Badminton Association of Malaysia ("plaintiff") suing through Encik Ng Chin Chai its public officer (who was its honorary secretary), for the sum of USD305,000, being the balance due under a marketing agreement dated 15 December 2005 ("marketing agreement").

[2] The defendant, who claimed to have transferred its obligations under the marketing agreement to Sports Media Promotions Sdn Bhd, ("SMP"), brought in the latter as third party and claimed to be indemnified by the third party. However, the learned High Court Judge dismissed the defendant's claim of indemnity as against the third party.

Brief Facts

[3] In 2005, the plaintiff was selected to organise the World Badminton Championship ("the championship") to be held in 2007.

[4] The plaintiff then entered into the marketing agreement by which certain commercial rights, such as marketing, promotional, advertising, marketing and licensing rights (including the right to the title sponsor's logo), were granted to the defendant for the consideration sum of USD900,000.

[5] The plaintiff had been paid the sum of USD595,000. It claimed that a balance of USD305,000 was still outstanding.

[6] It was undisputed that the defendant had sub-licensed its rights under the marketing agreement to SMP on 3 October 2006 ("sub-licence"). A sponsorship agreement was subsequently entered into between Perusahaan Otomobil Nasional Sdn Bhd ("Proton") and First Events Promotions Sdn Bhd ("FEP") on 16 January 2007 ("sponsorship agreement"), which led to the championship being renamed "Proton-World Badminton Championship 2007".

[7] The defendant claimed that pursuant to the sub-licence, and especially the sponsorship agreement, it was relieved of its obligations under the marketing agreement. In fact, the defendant claimed that as a result of the sponsorship agreement, it received no consideration from marketing agreement.

[8] The defendant sought to join in FEP as co-defendant but failed.

[9] The plaintiff however contended that it was not a party to the sub-licence or the sponsorship agreement. Under the marketing agreement, it was the defendant to whom the rights of commercial exploitation of the championship was given and on whom the obligation to pay the consideration fell.

The High Court Findings

[10] The findings and conclusions of the learned High Court Judge, in summary, are as follows:

(i) the plaintiff had contracted only with the defendant and had no privity of contract with SMP or FEP;

(ii) the fact that the plaintiff knew of the sub-licence and the sponsorship agreement after they were entered into did not change the fact that the plaintiff was not a party to the sub-licence or sponsorship agreement;

(iii) the defendant remained liable under the marketing agreement for the consideration payable under the agreement even though it may have parted with some of its rights under the marketing agreement to other parties, notably SMP.

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Grounds Of Appeal

[11] The defendant's memorandum of appeal consisted of 24 paragraphs. The main thrust of the defendant's appeal was that the learned High Court Judge had failed to properly and judicially evaluate and appreciate the evidence before the court.

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[12] The defendant invited us to intervene as it contended that the learned trial judge had erred in Her Ladyship's findings of facts.

Issues

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[13] In our view, the issues for determination before us were:

(i) whether the plaintiff had accepted the performance of the defendant's obligations under the marketing agreement by a third party;

(ii) whether the defendant continued to be liable under the marketing agreement.

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Decision

[14] The plaintiff, pursuant to an order directing further and better particulars to be furnished, acknowledged that it received a sum of USD50,000 from the defendant *via* an RHB cheque sent under cover of a letter dated 16 March 2006. However only USD40,000 was meant for the championship.

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[15] Plaintiff further acknowledged that it had subsequently received the following sums from FEP:

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21/05/2007: USD 100,000

31/07/2007: USD 200,000

22/10/2007: USD 255,000

[16] All of the plaintiff's witnesses denied having knowledge how it came to be that FEP was paying the sums. Only that they were told the money would be coming in from the "sponsors".

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[17] The learned trial judge had strictly focused on the issue of "privity of contract" and neglected to consider the other circumstances of the case, and even the terms of the marketing agreement itself with regard to the position and role to be played by the "sponsor" as defined in the marketing agreement.

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[18] A close perusal of the marketing agreement would reveal that the agreement envisaged the possibility of a third party entering into the picture as sponsor and having all the commercial rights granted to the defendant. The term "sponsor" is defined in that marketing agreement as follows:

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"Sponsor" means any third party being a partner or sponsor having contracted with ISM for any or all of the Commercial Rights;

[19] The defendant's pleaded case was that it had "sub-licensed" to SMP its rights and obligations under the marketing agreement. That is clear from its letter to the plaintiff dated 5 October 2006. By that letter it acknowledged that it would continue, however, to be responsible for the terms of the marketing agreement, including the financial obligations.

[20] However, on 16 January 2007, FEP entered into the sponsorship agreement with Proton. In para. (D) of the preamble to the sponsorship agreement, FEP claimed to have acquired the exclusive marketing, advertising and commercial rights to the championship from the defendant, and claimed to have the right to grant the rights set out in the agreement to Proton.

[21] Much was said about the rights "given away" by the defendant not having included broadcasting rights. This was true of the sub-licence, but not true of the sponsorship agreement. The term "commercial rights" as defined in the marketing agreement meant all the rights in cl. 3 and that included broadcasting rights. Indeed, cl. 5.6.21 of the sponsorship agreement provided for television broadcast to be arranged by FEP.

[22] Under the sponsorship agreement, FEP was to be paid the sum of USD1.2 million. Of great interest was that of that amount, the sum of USD900,000 (the same sum payable to the plaintiff under the marketing agreement by the defendant) was to be paid to FEP by Proton. It was to be paid in three instalments of USD300,000 each, on 30 April 2007, 30 June 2007 and 30 August 2007 respectively.

[23] Of critical importance was the question of whether the plaintiff knew of the sponsorship agreement.

[24] PW1, who was the President of the plaintiff at the material time and the person who signed the marketing agreement and whose signature appeared on the sponsorship agreement as the witness to the signature of FEP's Executive Chairman on the Sponsorship agreement, feigned ignorance of the terms of the sponsorship agreement, particularly recital (D) of the preamble to the sponsorship agreement.

[25] During cross-examination, when asked about the accounts and receipts for payments, PW1 claimed that as the President of the plaintiff his duties are "like Chairman, CEO. Not possible for me to know about everything that happens in BAM".

[26] During re-examination, PW1 stated that "As President, I do not get involved in all the nitty-gritty of documents signed or management of BAM. I am not expected to do that. Like any organisation it would be cascaded down to the officers in charge".

[27] That might have been true in relation to the details of accounts and receipts, but how could PW1, the President of the plaintiff, claim to be ignorant of the sponsorship agreement on which signing page his signature appeared and in which FEP claimed to have acquired the exclusive marketing, advertising and commercial rights to the championship from the defendant?

[28] According to the marketing agreement the plaintiff was a sports body duly registered under the Sports Development Act 1997. It was not a company, and described itself as an association. Therefore, the plaintiff did not have a separate entity, unlike a company. The plaintiff must therefore always be under the direct management and control of its office-bearers led by the President.

[29] It was inconceivable that PW1 did not know that the rights previously contracted out to the defendant had been taken over by FEP who then contracted out most of those rights to Proton, the sponsor.

[30] It was equally inconceivable that the plaintiff then accepted a sum of USD555,000 from FEP, allowed Proton and FEP then to "run" the commercial and marketing side of the championship, which was in fact held, without inquiring what had happened to the defendant and why was FEP in the picture?

[31] The learned High Court Judge acknowledged that from the evidence adduced monies were received by the plaintiff towards the "defendant's account". Her Ladyship also stated, in para. 109 of the judgement that:

> This evidence lends weight to SMP's contention that they were not the right party to be sued as there was obviously some other arrangement made whereby FEP had obtained some rights otherwise it would not have been making payments to the plaintiff towards the defendant's account.

[32] Unfortunately the learned High Court Judge decided not "to go into how FEP had come into the picture as insufficient evidence has been led on this issue before the court".

[33] In our view, the learned High Court Judge had erred in making that decision.

[34] There was certainly sufficient evidence as highlighted above to indicate the circumstances which led to the payment being made by FEP.

[35] Had Her Ladyship not declined to examine those circumstances, it would have been quite obvious to the court that the plaintiff had agreed to the rights and obligations under the marketing agreement being taken over by FEP.

[36] We were of the considered view that in the circumstances of this case, s. 42 of the Contracts Act 1950 applied.

[37] The plaintiff, being the promisee under the marketing agreement, had quite clearly accepted the performance of the promise from FEP. The plaintiff could not thereafter enforce that promise against the defendant.

[38] We therefore allowed this appeal with costs and set aside the order of the High Court against the defendant.

[39] We order that costs (here and below) in the sum of RM20,000 be paid by the respondent/plaintiff to the appellant/defendant, and that the deposit be refunded.